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SUPREME COURT, U.S.

No. 72

Supreme Court of the United States

October Term, 1955

FRANK COSTELLO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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The government, in its Summary of Argument (Brief, p. 8), says that it is not claimed that the indictment represents "an irresponsible or absurd judgment". Obviously petitioner can make no such claim, for he has been denied access to the minutes of the grand jury (even during the trial when there was no longer any possible need for secrecy), the only source which would enable him to make such a judgment.[1] But we respectfully submit that petitioner is not called on to take such a position. He has the right to require that the grand jury which indicted him base its deliberations on evidence which, as the authorities we have collected in our main brief demonstrate, precludes an indictment on incompetent hearsay alone. And petitioner does not rely solely on the Fifth Amendment.

[1] Of like character is the comment (Brief, p. 17) that "on petitioner's showing" there was a solid basis for the grand jury's determination. It is difficult to understand the basis for any such statement.

The other points made in the Summary will, of course, be dealt with as they are treated by respondent in its Argument.

1. While it is true, as respondent says (Brief, p. 14), that the conviction was upheld on appeal, petitioner has not acquiesced in that ruling and it is only because this Court restricted its grant of certiorari that he is not arguing with respect to the merits.*

Moreover, there is no way, under federal procedure, by which a defendant could ever have his rights vindicated except by appeal from conviction. And, accordingly, this Court has consistently ruled that a defect in an indictment which is one of substance is not cured by subsequent verdict of guilty.

United States v. *Carll*, 105 U.S. 611;
United States v. *Hess*, 124 U.S. 483;
Keck v. *United States*, 172 U.S. 434.

Surely it cannot be claimed that the defect here was unsubstantial. That sufficient competent evidence was produced at the trial to justify conviction has not been considered a reason for disregarding the infirmity of an indictment in a variety of cases in which fundamental rights of the accused had been violated. In our main brief, pp. 10, 13, we cited numerous instances in which convictions

* Of course this Court can, in order to avoid consideration of the constitutional issue, deal with other issues in the case (see *Neese* v. *Southern Railway Company*, 350 U. S. 77). Should the Court be so minded we respectfully refer to questions 2 to 8 in our petition discussed at pages 12-25. Since the entire record has been printed for the Court the material for consideration of these issues is, of course, available.

were reversed on the ground that the indictment should have been quashed because based on incompetent evidence.

Nausto v. *United States*, 20 F. 2d 376 (CA 8th);
Brady v. *United States*, 24 F. 2d 405 (CA 8th);
Walker v. *State*, 17 Ala. App. 555;
State v. *Grady*, 84 Mo. 220;
People v. *Nitzberg*, 289 N.Y. 523;
Estill Jr. v. *State*, 43 Okla. Cr. 99.

The same result has been reached where the defendant had been required to testify before the grand jury:

Edwardson v. *State*, 255 Ala. 246, 51 So. 2d 233 (1951);
People v. *Clifford*, 105 Col. 316, 98 P. 2d 272 (1940);
Taylor v. *Com.*, 274 Ky. 51, 118 S. W. 2d 140 (1938);
State v. *Gardner*, 88 Minn. 130, 92 N. W. 529 (1902);
State v. *Naughton*, 321 Mo. 298, 120 S. W. 53 (1909).

In cases arising under the equal protection clause of the Fourteenth Amendment where it is claimed an indictment is void because of discriminatory exclusion of Negroes from the grand jury, this Court has consistently reversed convictions regardless of the composition of the petit jury. The leading case is *Pierre* v. *Louisiana*, 306 U.S. 354 (1939).

In that case the trial judge had sustained the challenge to the petit jury and defendant was tried before a jury selected in an unimpeachable manner. This Court rejected the view of the state court that an indictment has no func-

tion other than to bring the accused to trial, and that therefore an indictment improperly obtained did not affect any constitutional rights. Mr. Justice Black pointed out that the state Constitution required (as does the United States Constitution in the case at bar) that "no person shall be held to answer * * * [there for 'capital' crime; here also for 'infamous'] unless on a presentment or indictment by a grand jury".

To like effect are *Smith* v. *Texas*, 311 U. S. 128 (1940); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Shepherd* v. *Florida*, 341 U. S. 50 (1950); *Reece* v. *Georgia*, 350 U. S.

As Mr. Justice Douglas said in *Ballard* v. *United States*, 329 U. S. 187, at 195:

> "But reversible error does not depend on a showing of prejudice in an individual case * * *. The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large * * *".

These words are equally applicable here.

2. The English cases discussed in respondent's Brief, pages 17-29, do not actually support respondent's position. Moreover, they throw no real light on the problem. We did not rest our case on English, but on American precedent. Perhaps the best answer was one made as long ago as 1831 by the Solicitor General of Massachusetts, Daniel Davis, in *Precedents of Indictments*, speaking of some of the English views:

> "This doctrine is wholly inadmissible in our government, where the protection of the innocent and the rights of the accused are among the first objects of the constitution and laws". (p. 25).

In any case, *King* v. *Dodd*, 1 Leach 155 (Brief, pp. 24-28), decides nothing here pertinent. For it holds only that the witness was in fact competent to testify. There was nothing inherently improper in the testimony before the grand jury, the attack having been directed at the manner in which the witness was taken there—an attack similar to the claim of "kidnapping" of a defendant himself which this Court has rejected (*Frisbie* v. *Collins*, 342 U. S. 519). Moreover, the decision rests on the principle that no right of defendant's had been violated, analogous to the cases holding that a defendant may not complain that property of another was illegally seized (see *United States* v. *Jeffers*, 342 U. S. 48) or telephone conversations of another disclosed in violation of law (*Goldstein* v. *United States*, 316 U. S. 114).

3. It is difficult to see how respondent can derive any comfort from *Holt* v. *United States*, 218 U. S. 245 (cited Brief, pp. 9, 31, 32). It is one thing to say that a court will not determine to what extent a grand jury may have been influenced by improper evidence. It is altogether different to say that it can find an indictment on such evidence alone.

We do not think that respondent can gain any comfort by reliance (Brief, pp. 10, 43, 59) on the *Banks* and *Zacher* cases which we referred to in our main brief (p. 12, footnote 4). Those cases do not deal with the situation in the case at bar, namely, testimony only of agents who never had any personal contact with defendant.

The government in its brief in this Court in opposition to the original application for certiorari in the *Bank's* case (No. 259, October Term 1953) pointed out (p. 12) that

the witness before the grand jury, McKusick, "could have testified from firsthand knowledge as to substantially all the probative evidence in the case"; and as was pointed out (pp. 14, 15), defendant in that case had made statements in writing which were submitted to the agent who testified before the grand jury. It is interesting to observe that when the *Banks* case again came to this Court (No. 337, October Term 1955), the government's opposition on this aspect of the case referred merely to its earlier reply. There was no contention then that the *Banks* case was governed by the principle announced by the Court below in the case at bar.

And in the *Zacher* case the government in its brief in the Court of Appeals pointed out (p. 27) that the agent, Hanley, who testified before the grand jury had "many conversations with appellant", arguing that such statements would not be incompetent or hearsay. The government argued that "it was therefore not necessary for the Court of Appeals for the Eighth Circuit to go as far as was recently done in the Second Circuit", referring to the instant case. And it is clear from that portion of the court's opinion quoted by the government itself (Brief, pp. 44, 45) that the Court of Appeals found it was not necessary to pass on the precise question here presented, holding that competent evidence had there been submitted to the grand jury.

It is evident, therefore, that neither the *Banks* case nor the *Zacher* case is authority here.

As to *Lagow v. United States*, 279 Fed. 496 (cited Brief, pp. 10, 46), that case is certainly not authority for respondent's position. For there the inspector who tes-

tified before the grand jury clearly had personal knowledge of various matters about which he testified.

It is also significant that the opinion in the *Lucas* case (279 Fed. 496 at 498) recognizes that the rule is as we contend here rather than as claimed by respondent. The court there said:

> "* * * According to the weight of authority among courts which permit inquiry, it is not sufficient to show that some of the evidence was incompetent, but it is essential to show also that the evidence was incompetent as a whole."

The statement (Brief, pp. 33) that the finding of an indictment is conclusive on the issue of probable cause throws no light on our problem. The cases cited (*Ex parte United States*, 287 U. S. 241, and *Ewing v. Mytinger & Casselberry*, 339 U. S. 598) dealt only in abstract generalities. The Court was not concerned with the question whether or not an indictment could be directly attacked because without basis in proof.

There is nothing in any of the other federal cases which warrants discussion. Obviously there have been dicta on all phases of this question, but not even a statement much less a holding which directly approves an indictment based solely on incompetent hearsay evidence.

4. Respondent's assertion that the decisions in various states can be "ignored" (Brief, p. 46) because they rest on special statutes, itself ignores the fact that the courts in at least some of those states have taken the position that the right to be indicted only on competent evidence rests on the common law and on constitutional principles (see Main Brief, p. 14).

Respondent considers significant (Brief, p. 47) the statement in *People* v. *Rosenblatt*, 1 Abb. Pr. (NY) 268, that the court there recognized that there was no precedent for its action. More significant, it seems to us, is the court's answer to that argument (bot. p. 270):

> "* * * but when it is demanded by what are in my judgment the legal rights of the accused, it is no answer, and shall not stay this court from a prudent and careful performance of its duty."

There is no doubt that many states permit no inquiry—but they do not hold that when the fact appears that an indictment was based on improper evidence alone this can be ignored.[3]

5. Coming to policy considerations, respondent (Brief, pp. 11-13, 49-58) repeats most of the arguments made by Judge Hand below. Thus is stressed the fact that since an accused personally may not cross examine any of the witnesses before the grand jury, the importance of avoiding hearsay is minimized. But not even a grand juror could ascertain the truth by questioning a witness reporting mere hearsay.

Besides, the objection to hearsay evidence is more than that it makes cross examination impossible. It constitutes unsworn testimony. See *Bridges* v. *Wixon*, 326 U. S. 135 at p. 153 and footnote 6, p. 154; and *Donnelly* v. *United States*, 228 U. S. 243 at p. 273. And unsworn testimony

[3] Respondent is correct in its comment (Brief, p. 47) with regard to the *Gadden* case, 160 Pa. Sup. 269 cited on p. 13 of our original brief). That reference was due to an error in seeing the brief through the press. The correct reference should have been *Com.* v. *Ross*, 58 Pa. Sup. 412 (1914), as explained in *Com.* v. *Gadden*, 160 Pa. Sup. 269, 50 A. 2d 722 (1947)—indictment quashed.

was long ago held to invalidate an indictment. *United States* v. *Coolidge*, 25 Fed. Cas. No. 14,858 (C. C. D. Mass. 1815).

The dictum (Brief, pp. 49, 50) that we carry on our daily business on the basis of hearsay is hardly relevant—we don't, in that daily business, require people to stand trial for crime. The standards of the market place ought not to be substituted for constitutional protection in criminal trials.

We are at a loss to understand the argument (Brief, p. 52) that the grand jury would have acted on hearsay if it had heard the witnesses who testified at the trial with respect to petitioner's expenditures.

We are entirely unmoved by the government's suggestion (Brief, pp. 55-57) that petitioner may be unduly favored should this Court reverse, because not every defendant might be able to ascertain the facts as petitioner did here.[4] The same observation would have defeated the successful petitioners in the search and seizure and wiretapping cases—obviously not every defendant whose property is unlawfully seized or whose wires are tapped ever finds out the facts.

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[4] Respondent (Brief, p. 54) suggests that had it objected at the trial, petitioner might have been prevented from ascertaining whether or not witnesses had testified before the grand jury, intimating that the government did not object. This is not exactly in accordance with the facts. The questions with regard to grand jury testimony put to the witnesses John A. Regan and James A. Ronayne were objected to by the government (115a, 120a, 127a) and at that time the objections were sustained. It does not appear what induced the government to change its position and refrain from further objections. In any event, the cases cited hold only that ordinarily the question is discretionary with the trial court.

It is also to be supposed that if the Court holds that indictments may not be based solely on incompetent hearsay evidence, federal prosecutors will obey such ruling so that defendants will be treated equally fairly without any element of chance.

Somehow or other the government has the impression that because grand juries are independent (Brief, pp. 19, 57), therefore they are beyond judicial scrutiny. In the sense that the courts cannot compel a grand jury to indict, that body is indeed independent. But it is no more beyond judicial scrutiny when it acts contrary to law or the Constitution than is the executive or the legislature—both "independent" areas of government in the ordinary sense. To hold otherwise is to make the grand jury an anarchistic body which has no place in our society.

6. The government further (Brief, p. 54, note 27; pp. 58, 59) tries to support its position by the suggestion that the testimony of the agents could have been "presumed" to have rested entirely on documents or records, although it carefully refrains from asserting that any documents or records were in fact before the grand jury. Not having seen the grand jury minutes, we cannot categorically refute such statement. Petitioner was not, moreover, allowed to show what exhibits were before the grand jury (1575a, 1576a). But an examination of the trial record demonstrates its inherent improbability. Besides, if there had been any competent evidence in the form of documents or otherwise before the grand jury, the government could have and no doubt would have seen to it that the record here would so indicate. At the trial the agents (see Exh. 363, Vol. IV, p. 42) reached their conclusion about the

amount of income they said should have been reported by petitioner and his wife on the basis of the expenditures summarized in Exhibit 363D which, as appears on its face, was prepared during the trial (see Vol. IV, pp. 46-48, cf. 1387a)

That exhibit is based on the testimony of 107 witnesses. By no means all of these produced records to substantiate their accounts of transactions with petitioner or his wife. The last item on the exhibit, "Travel", was, for instance, the result of an inference based on tariffs filed by various carriers. In addition, with regard to the following witnesses the Exhibit itself refers to no documentation: "Geo. Wolf Disbursements"; "Corporation Counsel"; "Geo. Wolf Fees"; "Fred Cohen"; "Terminal Barber Shop"; "Bayview Market"; "Estelle Brown"; "May Branch"; "Marjorie Porter"; "Helen Spaer". These items aggregated $23,500.

Moreover, none of the witnesses who referred to transactions with Mrs. Costello can be connected with petitioner on the basis of any records. These transactions amounted to over $105,000 and involved 76 persons. These items were attributed to petitioner on the government's contention at the trial that he had admitted that his wife had no independent sources of income. In the court below the government (Brief in Court of Appeals, p. 33) relied on statements made by petitioner to Ronayne who, however, did not testify before the grand jury (1783a) and (p. 35) on testimony by George Wolf (who also had not testified before the grand jury 1056a, 1057a) that petitioner had told him that the only income which his wife had was that which was reported in the tax returns (1041a).

Nor can the government derive any comfort from the fact that the agents who testified were experts. For it is well settled that opinion evidence unsupported by proper proof of the underlying facts must be disregarded and creates no issue for a jury: *United States* v. *Michener*, 152 F. 2d 880; *United States* v. *Ward*, 169 F. 2d 460; *Strasberg* v. *Equitable Life Ass. Soc.*, 281 App. Div. (N. Y.) 9.

7. The constant stress (Brief, pp. 8, 9, 11, 13, 15, 31, 49, 50, 51, 56, 57) on the fact that grand jurors are laymen and presumably unable to distinguish what is hearsay, comes with ill grace from the department of the government charged with concern for individual liberty (see *Berger* v. *United States*, 295 U. S. 78, 88; *Viereck* v. *United States*, 318 U. S. 236, 248) as well as with prosecution of crime. Particularly is this so since a representative of that department was responsible for the presentation of the evidence before the grand jury and was on hand while it was being presented. Far other was the view taken by a prosecutor more than a hundred years ago. The Solicitor General of Massachusetts, Daniel Davis, in *Precedents of Indictments*, published in Boston in 1831, said:

> "It was formerly held, that the grand jury ought to find a bill, if probable evidence were adduced to support it, because it is only an accusation, and the prisoner can defend himself on his trial. But this is an oppressive and dangerous position; and has since been denied and almost repudiated by the greatest sages of the law, who have deprecated the ignominy, danger of perjury, the anxiety of delay, and the misery of a prisoner, that might be the consequence of an accusation of an offence, upon evidence that does not fully satisfy the grand jury

> of the guilt of the accused. Accordingly, it has now become a settled principle, that the grand jury cannot, consistently with their oath, find a bill, except on such testimony as would justify them, as a traverse jury, to find the prisoner guilty. (p. 24).
>
> • • • • •
>
> "And it is a rule *without an exception*, that no evidence can be admitted or received by the grand jury, which would not be admitted on the trial of the defendant; such as hearsay evidence • • •." (Emphasis ours)

What Mr. Davis said so long ago remains sound doctrine. It should be pronounced as such by this Court.

8. The suggestion is made (Brief, pp. 5, 15, 58, 59) that an indictment based only on hearsay should be condoned if the testimony is that of Internal Revenue agents because of their experience in investigation. But there is nothing special about revenue agents, since practically all federal crimes are first investigated by some agency of government—the F.B.I., Treasury agents in customs matters, postal inspectors, etc. Yet the general rule has been that witnesses other than such agents are called before grand juries. Moreover, the very fact that these agents are, in a very real sense, part of the government should cause one to pause before subscribing to the doctrine that their testimony alone when based on no direct knowledge should be accepted for that of witnesses who do have such knowledge.

This is particularly true of Special Agents, for in accordance with the Manual of Instructions "The Special Agent in charge will be the officer responsible for a recommendation for or against criminal prosecution • • •"

(Para. 678 of the Manual of Instructions for Revenue Agents, as quoted in *United States* v. *Lipshitz*, 132 F. Supp. 519, at 521).

Indeed, may it not be said that such a government agent is part of the prosecution between whom and the people the grand jury stands (*Hale* v. *Henkel*, 201 U. S. 43; *Hoffman* v. *United States*, 341 U. S. 479, 485).

Then too, if an agent's hearsay report be deemed sufficient, wouldn't the reading of such report to the grand jury by a prosecutor suffice. The next logical contention in the process of whittling away constitutional guaranties might be that indictments may be based solely on reports of Congressional committees or other investigators.

9. No doubt the government advanced the same arguments as it has here advanced when it was first suggested to this Court that a conviction be reversed because illegally seized evidence had been used. And at that time there were but few American precedents favoring the position advanced and many directly opposing it.[5] It is interesting to note that Wigmore, whose authority is invoked by the government here (Brief, p. 50), has also criticized this Court's search and seizure rulings. See Wigmore, Evidence, 1st ed. §2264, pp. 265-7; 8 Wigmore 3d ed. §§2183, 2184, pp. 44-45; §2264, pp. 366-372; Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 ABAJ 479.

Yet this Court, in *Weeks* v. *United States*, 232 U. S. 383, rejected the view that it was bound by historical considerations or the weight of authority and laid down the r[illegible]e

[5] The authorities are conveniently collated in Fraenkel, Concerning Searches and Seizures, 34 Harvard Law Review 361, 368, notes 42, 43, 44.

which has ever since been adhered to (see *United States* v. *Heffers*, 342 U. S. 48), and which alone gives substance to the constitutional guaranty. And whether, as intimated in *Wolf* v. *Colorado*, 338 U. S. 25, this is more a rule for the guidance of federal courts than of constitutional construction, here too this Court can lay down a rule for the guidance of federal courts which will give substance to the constitutional requirement of indictment. For as was said in *Holland* v. *United States*, 348 U. S. 121, at 135 (note 7):

> "This Court will formulate rules of evidence and procedure to be applied in federal prosecutions where it appears necessary to maintain 'proper standards for the enforcement of the federal criminal law in the federal courts.' *McNabb* v. *United States*, 318 U. S. 332, 341."

In the *McNabb* case this Court concluded that such proper standards forbade conviction where the "incriminating statements had been obtained while defendant had been unlawfully detained". As Mr. Justice Frankfurter there said at page 340:

> "* * * Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law'-and below which we reach what is really trial by force."

So here, the Court should, at the very least, determine that similar standards forbid conviction on an indictment unsupported by any competent evidence.

CONCLUSION

It is respectfully submitted that respondent has produced no authority in support of its views, nor has it overcome the force and logic of the decisions of many courts supporting petitioner's position. And a balancing of the policy considerations should lead this Court to accept the rule as found and applied in these decisions.

There can be no harm to the administration of justice because a careful prosecutor should present adequate evidence to the grand jury; indeed, it would be to his advantage to do so because in that way he has put his witnesses on record and has established a solid ground for prosecution. On the other hand, to permit indictments to stand entirely unsupported by any competent evidence would go far to destroying the protection of the constitutional guaranty and would open the door to countless abuses.

The conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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